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Pete Ricketts, Governor

July 2, 2020

U.S. Environmental Protection Agency
EPA Docket Center
Docket ID No. EPA-HQ-OW-2020-0008
Mail Code 28221T

ATTN: David P. Ross, Assistant Administrator
Office of Water

RE: Nebraska Department of Environment and Energy Comments
Docket No. EPA-HQ-OW-2020-0008

Dear Mr. David P. Ross,

Thank you for the opportunity to submit comments regarding whether the Environmental Protection Agency (EPA) should reconsider the position that approval of a Clean Water Act (CWA) Section 404 Program is nondiscretionary for purposes of Endangered Species Act (ESA) Section 7 Consultation. The Nebraska Department of Environment and Energy (NDEE) supports reconsideration, and recommends EPA adopt a discretionary position where States who assume 404 permitting responsibilities are allowed to work with the U.S. Fish and Wildlife Service, and/or National Marine Fisheries Service (Services) to conduct an ESA Section 7 programmatic review as part of the assumption application. The State of Nebraska is currently in the exploratory phase of assuming the 404 program from the U.S. Army Corps of Engineers (Corps). It is the opinion of NDEE that:

- When the EPA approves a state for 404 assumption, they agree that the assuming state has the ability and authority to uphold and enforce the requirements for CWA section 404.
- CWA 404(g) and (h) require states that assume the 404 permitting program to possess the authority and assure compliance with the requirements of the ESA.
- CWA 404 (b)(1) 230.10(5)(b) currently states that no discharge of dredged or fill material shall be permitted if it: jeopardizes the continued existence of species listed as endangered or threatened under the ESA. The right of state's sovereign ability to govern within their jurisdictions along with the authority granted through CWA 404(g) and (h) explicitly allows for assumed states to make their own ESA permitting decisions.
- States that assume the 404 program currently must require permittees to avoid impact to listed species, or obtain an Incidental Take Permit from the Services as stated under ESA Section 10. A Habitat Conservation Plan may also be required. This process can drastically increase time to issue permits, and increase costs to the projects' sponsors. This unnecessary duplication efforts is not only a significant barrier to assumption but also goes against the fundamental structure of cooperative federalism within the CWA.

Department of Environment and Energy
P.O. Box 98922
Lincoln, Nebraska 68509-8922

Jim Macy, Director
OFFICE 402-471-2186 FAX 402-471-2909
ndee.moreinfo@nebraska.gov

- Allowing states to pursue ESA Section 7 consultation and have a predetermined biological opinion instead of requiring permittees to engage in separate Section 10 reviews would greatly increase the efficiency of the permitting processes. Requiring the permittees to attain permits from the state as well as the services would add a redundant step that would slow progress and increase cost of essential projects.

The Department supports EPA reconsidering its current nondiscretionary position, and recommends EPA approval of the state assumption of a CWA Section 404 Program that is discretionary for the purpose of ESA Section 7 consultation. This policy would create a more streamlined and cost effective permitting process.

In addition to the specific comments requested on the ESA process, NDEE would like to bring to your attention two additional points to consider addressing which may impact states, like Nebraska, who are exploring assumption of CWA Section 404 Program:

- CWA (h)(1)(A)(ii) limits issued 404 permits of assumed states to a fixed term not to exceed five years. Currently the USACE's permit terms are regulated under 33 C.F.R.325.6 which does not impose specific duration limits on their issued 404 permits. As a state investigating assumption of the 404 program, we expect to permit large infrastructure projects that may take more than five years to complete. This strict term limit requires assumed states to complete a burdensome re-assessment of issued 404 permits at a significant cost to our state resources.
- States assumption of the CWA Section 404 program is also hindered by federal regulations prohibiting partial assumption of the program. While NDEE is interested in investigating how partial assumption could work in Nebraska and looking forward to the release of EPA's proposed 404 Assumption Rule, the importance of flexibility in streamlining the permitting process and not duplicating efforts must be at the forefront of the new rule.

We appreciate the opportunity to provide comments on this important topic.

Sincerely,

Jim Macy
Director